

have addressed community issues with whatever types of programming, that in its reasonably exercised discretion, it determined was appropriate to those issues.”<sup>85</sup> In any case, the issues/programs lists provide examples of significant issues addressed by WWOR-TV in each of the municipalities identified by the *Petition*, as the *Petition* itself makes clear.<sup>86</sup>

### 3. *April 2007 Newscasts*

Finally, the Petitioners fare no better in attempting to rely upon their own review of approximately 12 days of WWOR-TV’s local newscasts during April 2007.<sup>87</sup> As noted above, no rational conclusions about a station’s *overall* service to its community can be drawn from so limited an amount of time. Nor can the Commission evaluate a station’s efforts based only on local newscasts, which of course is only one of many types of programming that WWOR-TV offers to be responsive to its viewers’ interests. But even within the brief period covered by the Petitioners’ newscast analysis, there is no

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<sup>85</sup> *In re RKO General, Inc.*, 1 FCC Rcd at 1086; *see also License Renewal Applications*, 5 FCC Rcd at 3848 (holding that licenses are not required to present programming concerning a particular segment of the community “in proportion to their percentage of the overall community’s population” and need not “respond[] to problems of every community group”). Moreover, to the degree that Petitioners identify a handful of news subjects that they claim were not covered by the station, *see Petition*, at 11, 13, it lies within the licensee’s discretion to determine which subjects warrant news coverage. A “licensee is under no obligation to cover each and every newsworthy event which occurs within a station’s service area.” *In re American Broadcasting Companies, Inc.*, 83 F.C.C. 2d at 305.

<sup>86</sup> *See Petition*, at 9-11.

<sup>87</sup> *See id.* at 11-13. The *Petition* indicates that the analysis focused on 12 days, though it acknowledges that 1 day was omitted due to a “recording error.” *Id.* at 11. The exhibit offered in support of this analysis, however, shows two distinct days during the Petitioners’ 12-day window for which no data is provided. *See id.* at Exhibit D.

evidence to suggest that WWOR-TV has shirked its obligation to cover issues of importance to New Jersey.

Indeed, the evidence supplied by the Petitioners reflects that each of WWOR-TV's newscasts during the period studied spent time addressing stories specific to New Jersey.<sup>88</sup> Again the Petitioners inappropriately excluded from consideration national and regional stories, but even based on the calculations contained in the *Petition*, the station provided an average of five stories per night, lasting on average nearly six minutes.<sup>89</sup> The summaries provided in Exhibit D to the *Petition* make it quite difficult to tell exactly how the Petitioners analyzed WWOR-TV's newscasts, and it is unclear whether similar stories were treated the same way on different days. The summary data reported for April 12, for instance, says that the station aired 6 New Jersey stories totaling just under 4 minutes.<sup>90</sup> But the supporting details supplied by Petitioners actually reveal 10 stories totaling more than 8 minutes.<sup>91</sup> Similarly, the summary for April 13 reflects 7 stories/8.5 minutes, but the detail shows 8 stories lasting more than 11 minutes.<sup>92</sup> Even if the newscasts studied did constitute a representative sample – and they do not – these irregularities make it impossible for the analysis to be considered reliable.

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<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.* at Exhibit D, Summary.

<sup>91</sup> *See id.* at Exhibit D, page 1.

<sup>92</sup> *See id.* at Exhibit D, Summary and page 4.

Moreover, although they offered no justification for the decision to evaluate 12 apparently random days in April 2007,<sup>93</sup> the Petitioners noted that this time period happened to coincide with three significant national news events related to New Jersey: the Don Imus/Rutgers Women's Basketball scandal; the car wreck involving Gov. Jon Corzine; and the powerful rainstorm that caused massive flooding and property damage.<sup>94</sup> As the Petitioners acknowledge, WWOR-TV provided detailed coverage of these news stories.<sup>95</sup> But incredibly, the Petitioners then criticize WWOR-TV for devoting too much attention to these stories in comparison to other New Jersey news.<sup>96</sup> It is patently unfair, however, for the Petitioners to summarily dismiss WWOR-TV's efforts to cover important local stories in order to claim that the station does not effectively cover local news. If anything, Fox's coverage of these critical local stories only serves to confirm its commitment to devote time and resources to address the most compelling issues facing its viewers.

In short, the Petitioners' claims are riddled with flaws and inconsistencies, and they fail to raise any legitimate questions regarding WWOR-TV's renewal application.

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<sup>93</sup> See *RKO General, Inc.*, 1 FCC Rcd at 1088, n. 45 (criticizing a study purporting to measure WWOR-TV's local programming for, among other things, days chosen for evaluation: "We do not know . . . whether the days selected represent [the licensee's] best, worst or typical performance").

<sup>94</sup> See *Petition*, at 12.

<sup>95</sup> See *id.*; see also *id.* at Exhibit D.

<sup>96</sup> See *Petition*, at 13.

**B. Contrary to the *Petition*'s Unsupported Speculation, Fox Remains Committed to WWOR-TV's Physical Presence in New Jersey**

Relying on mere conjecture, the Petitioners also question WWOR-TV's commitment to a physical presence in New Jersey as well as its long-term commitment to identifying with the state.<sup>97</sup> The *Petition* speculates, for example, that Fox is preparing to relocate the station's operations out of New Jersey, and that WWOR-TV has taken on a strong New York identity.<sup>98</sup> These unsupported allegations also fail to raise any question about the merits of the WWOR-TV renewal application.

Fox reiterates here what it has told the Commission before – it has no plans to relocate WWOR-TV's operations out of New Jersey.<sup>99</sup> On the contrary, Fox is committed to maintaining a significant physical presence in the state. WWOR-TV operates its main studio out of its Secaucus facility, which also serves as the headquarters for the station's substantial news-gathering apparatus. Fox employs 80 full-time personnel in the station's news department, including news managers, news anchors, sports reporters, weathercasters, reporters, editors, and photographers.<sup>100</sup> WWOR-TV also maintains a satellite news gathering truck for both itself and sister station

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<sup>97</sup> See *id.* at 14.

<sup>98</sup> See *id.*

<sup>99</sup> See Letter from Maureen O'Connell, Vice President, Regulatory and Government Affairs, News Corporation, to Kenneth Ferree, Chief, Media Bureau, dated October 27, 2004 (noting that "Fox has no plans to relocate [WWOR-TV] to New York, but rather intends to continue to have a strong physical presence in its state of license").

<sup>100</sup> See Declaration of Molly Pauker, attached hereto as Exhibit A.

WNYW(TV) at the Secaucus facility, along with five other live news trucks that service both stations' New Jersey newsgathering efforts.<sup>101</sup>

Petitioners also cite to the WWOR-TV web site ([www.my9ny.com](http://www.my9ny.com)), and its branding as "My9NY" in promotional materials, as an indication that Fox has "eschewed any reference to its New Jersey roots."<sup>102</sup> None of this is relevant to the question of whether WWOR-TV has broadcast issue-responsive programming during its license term, and the Commission need not consider these allegations any further.<sup>103</sup> It is hardly remarkable, though, that a television station operating as the affiliate for the MyNetworkTV television network in the New York designated market area – the nation's largest – would brand itself in a way meant to highlight its network affiliate status. These branding efforts, relating to network affiliation, do nothing to undermine the station's commitment to providing its viewers with news and information uniquely suited to New Jersey residents, as amply demonstrated above.

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<sup>101</sup> *See id.*

<sup>102</sup> *See Petition*, at 14.

<sup>103</sup> *See, e.g., In re WWOR-TV, Inc.*, 6 FCC Rcd 193, 206 (1990) (finding that WWOR-TV's use of promotional names that failed to mention New Jersey was irrelevant); *In re RKO General, Inc.*, 1 FCC Rcd at 1088, n. 47 (finding that promotional materials had no bearing on analysis of WWOR-TV's New Jersey programming efforts).

#### IV. CONCLUSION

As demonstrated above, the *Petition* reveals a disturbing disregard for the fundamental constitutional principles that have permitted the development of a robust and free press so critical to the functioning of democracy. Although reasonable people can disagree about the press' editorial choices, the Petitioners would have the government become the final arbiter of those disagreements when it comes to broadcast journalism. The *Petition's* proffered approach, however, conflicts so gravely with constitutional principles that it must be dismissed.

Regardless, the *Petition* fails to allege a prima facie case that WWOR-TV's overall programming effort throughout its license term failed to serve the public interest. Perhaps that comes as no surprise, given Fox's record of exemplary service to

viewers throughout northern New Jersey. Accordingly, consistent with controlling precedent, and the strictures of the Constitution, the *Petition* should be dismissed.

Respectfully submitted,

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Dated: May 30, 2007

# **EXHIBIT A**



### DECLARATION


I, Molly Pauker, hereby state as follows:

1. I am Vice President of Fox Television Stations, Inc. ("Fox"), licensee of WWOR-TV, Secaucus, New Jersey.
2. I have read the foregoing Opposition to Petition to Deny of Fox, dated May 30, 2007 ("Opposition"), which has been prepared in response to the Petition to Deny, filed April 30, 2006 by Voice for New Jersey, with respect to the license renewal application of WWOR-TV.
3. Except for matters as to which official notice may be taken, I have personal knowledge of the facts contained in the Opposition and declare that such facts are true and correct. In particular, Fox acquired WWOR-TV in July 2001. Since that time, WWOR-TV has broadcast more than 2,000 hours of regularly-scheduled local newscasts as well as more than 200 hours of public affairs programming. WWOR-TV also broadcasts breaking news alerts and updates, such as live coverage of Gov. Jon Corzine's March 2006 press conference regarding the state budget and the need for tax increases. And the station regularly airs special coverage of local community events, such as the Muscular Dystrophy Telethon or various civic pride parades.
4. WWOR-TV airs two weekly public affairs programs that provide extensive treatment of New Jersey political issues. *Ask Congress* debuted in the Fall of 2006 and each week featured an in-depth interview with one of New Jersey's U.S. Senators or Congressional Representatives. After conducting interviews with both Senators and nine of the state's 13 Representatives (all were invited), the station transitioned the program to a new show entitled *New Jersey Now*, which uses a similar format to conduct interviews with members of the New Jersey General Assembly and state senators, as well as political leaders and candidates for local positions such as a town's Board of Education. In addition, WWOR-TV broadcasts *Real Talk*, which focuses on civic and community leaders; the program recently featured interviews with representatives of Newark Now (an organization devoted to equipping and empowering Newark residents with the tools and resources needed to transform their communities through neighborhood-based associations and tenant organizations) and AARP New Jersey (which advocates for enhancing the quality of life for all people as they age).
5. Earlier in its license term, WWOR-TV broadcast other weekly public affairs programs, which also catered to New Jersey residents' needs and interests. *Garden State Matters*, for example, focused on a variety of topics of local interest, such as an interview with the New Jersey Public Utilities Board president to discuss the blackout that affected the state in 2004. *Black Experience* and *Hispanic Horizons*, meanwhile, centered on subjects of particular concern to the

large African American and Hispanic populations, respectively, in northern New Jersey.

6. In the past two years alone, WWOR-TV has broadcast more than 20,000 public service announcements ("PSAs"), focusing on a variety of causes, including the Boys & Girls Clubs of New Jersey and CASA of New Jersey, which advocates for abused and abandoned children in proceedings before state courts. Station personnel (including on-air talent) also routinely volunteer at charitable events throughout northern New Jersey.
7. WWOR-TV also broadcasts a variety of entertainment and sports programming – including serving as the over-the-air home of the New Jersey Nets as well as Major League Baseball games featuring the Yankees. The station in recent years has aired numerous Big East Conference football and basketball games featuring New Jersey schools Rutgers and Seton Hall universities as well.
8. Fox employs 80 full-time personnel in WWOR-TV's news department, including news managers, news anchors, sports reporters, weathercasters, reporters, editors, and photographers. The station also maintains a satellite news gathering truck for both itself and sister station WNYW(TV) at the Secaucus facility, along with five other live news trucks that service both stations' New Jersey newsgathering efforts

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 30, 2007.

  
Molly Pauker  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Opposition to Petition To Deny has been served by first-class mail, postage prepaid (except where otherwise indicated below), as of the 30th day of May, 2007, on the following persons at the address shown below:

Barbara Kreisman, Esq.\*  
Clay Pendarvis, Esq.\*  
Federal Communications Commission  
Media Bureau  
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Voice for New Jersey  
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Katherine M. Coughlan

\* served via electronic mail

**FILE COPY**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the matter of )  
 )  
FOX TELEVISION STATIONS, INC. )  
 )  
Licensee of Television Stations )  
WNYW(TV), New York, New York, and )  
WWOR-TV, Secaucus, New Jersey )  
 )  
NEWS CORPORATION )  
 )  
Request for Waiver of the Newspaper/  
Broadcast Cross-Ownership Rule )  
Relating to WNYW(TV), WWOR-TV )  
and the New York Post )

**FILED/ACCEPTED**  
**JUN 23 2008**  
Federal Communications Commission  
Office of the Secretary

**SUPPLEMENT TO PETITION  
FOR MODIFICATION OF PERMANENT WAIVER**

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Dated: June 23, 2008

**WWOR-LOI-000062**

## SUMMARY

News Corporation (“News Corp”) and Fox Television Stations, Inc. (“FTS”) hereby supplement their Petition for Modification of Permanent Waiver and demonstrate that regardless of the standard the Commission uses to evaluate their request, ownership of two television stations along with a daily newspaper in the incredibly diverse and competitive New York market should be permitted under the newspaper/broadcast cross-ownership rule (“NBCO rule”).

News Corp and FTS have owned the *New York Post* newspaper and WNYW(TV) in the New York market pursuant to a permanent waiver of the NBCO rule since 1993, when News Corp literally saved the *Post* from extinction. In 2001, FTS purchased a second television station in the market, WWOR-TV. At the time, FTS explained that its acquisition of a second television station, in full compliance with the local television ownership rule, had no bearing on the NBCO rule and thus was permissible under the existing permanent waiver. The Commission did not address FTS’ position, but instead granted News Corp and FTS a 24-month temporary waiver permitting common ownership of the *Post* with WNYW(TV) and WWOR-TV in light of the “diverse nature of the New York market.”

During the intervening 24 months, in the Summer of 2003, the FCC repealed the NBCO rule in its entirety, conceding that the rule may harm the Commission’s localism goal while providing no benefit to the goals of diversity or competition. The United States Court of Appeals for the Third Circuit affirmed the

Commission's decision, finding that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest." The Court, however, issued a comprehensive stay relating to all of the FCC's media ownership rule changes, which precluded the repeal of the NBCO rule from going into effect.

News Corp and FTS therefore filed their Modification Petition in 2004, urging the Commission to find once and for all that common ownership of the *Post*, WNYW(TV) and WWOR-TV in New York, the nation's largest and most vibrant media market, could not possibly cause any public interest harms. Indeed, News Corp and FTS pointed out that common ownership of these outlets had rescued the *Post* from bankruptcy, enabling the paper to continue serving as a unique and diverse voice of news and information. The Modification Petition also explained in great detail that the New York market is exceptionally diverse and competitive. The Commission should have considered the petition long ago, and if it had, it would have been compelled to grant News Corp and FTS relief from the NBCO rule given the characteristics of the market.

Since the filing of the Modification Petition, New York's media landscape has become even more diverse and competitive. Notwithstanding common ownership of WNYW(TV) and WWOR-TV, New York is still served by 18 independent owners operating 23 television stations. More than 125 separate owners operate in excess of 250 radio stations. And while most major American cities today have a single daily newspaper, the New York market has more than two dozen – 8 of which have circulations exceeding 100,000 homes. All of this is to say nothing of the incredible

contributions to diversity and competition made by scores of websites providing New York-oriented news and information, as well as hundreds of cable and satellite programming channels, weekly newspapers and magazines.

Notwithstanding the Commission's judicially-affirmed decision to repeal the NBCO rule, and without having acted on the Modification Petition, the Commission in 2008 announced that it was retaining the rule subject only to modest relaxation. In particular, the FCC adopted a presumption that common ownership of a newspaper and broadcast station in markets outside the Top 20 (as well as combinations of multiple newspapers and/or broadcast stations in markets of any size) would be inconsistent with the public interest. The Commission explained that this presumption can be rebutted, however, and specifically noted that an evaluation of whether to apply the rule must take into account the "particular nature of the market at issue"; thus, "what may make sense for Portland, Maine does not necessarily make sense for New York City."

The FCC laid out four factors that it said will inform its analysis of any proposed newspaper/broadcast combination. Evaluation of each of these factors indicates resoundingly that common ownership of WNYW(TV), WWOR-TV and the *Post* should be permitted, and that any presumption against an NBCO rule waiver is easily rebutted by the unique attributes of the New York market and these outlets.

First, common ownership already has led to an increase in the amount of local news disseminated by these outlets; the *Post* likely would not survive to contribute news and information to the market absent News Corp's ownership. The stations, meanwhile, have dramatically increased their own production of local news and

informational programming. Second, the newspaper, WNYW(TV) and WWOR-TV all have their own editorial decision-making teams, and each exercises its own independent editorial judgment in the selection of news. Third, the New York market is intensely competitive, with no market concentration. News Corp and FTS retained Dr. Mark Fratrik to conduct an analysis of competition in the market, and he determined that common ownership of WNYW(TV), WWOR-TV, and the *Post* produces a Herfindahl-Hirschman Index (“HHI”) of 763, which is firmly below the cut-off for unconcentrated markets as determined by the Justice Department. Even a cursory review of these outlets’ competitive standing in the market confirms Dr. Fratrik’s findings – the *Post* ranks last in advertising revenue among the five major dailies that serve the New York market, and its circulation is declining. The two stations, likewise, have witnessed ratings and audience share erosion. Fourth and finally, like many newspapers today, the *Post* indisputably is in “financial distress.” It has been widely reported that the paper loses an estimated \$50 million annually, and has been losing money for some time.

In short, whether evaluated pursuant to the long-pending Modification Petition or the new four factor test, there can be no doubt that in a market with literally hundreds of independently-owned media voices, common ownership of the *Post*, WNYW(TV) and WWOR-TV causes no public interest harms and should be permitted. Indeed, common ownership of these three outlets has been a boon to localism, competition and diversity, literally preserving the *Post* as a media voice in New York. Accordingly, the Commission should modify the permanent waiver and permit common ownership of WWOR-TV, WNYW(TV) and the *Post*.



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Exhibit A: Media Voices in the New York DMA

Exhibit B: *Analysis of the Level of Concentration in the New York Media Market*, Mark R. Fratrik, Ph. D., BIA Financial Network, June 23, 2008

Exhibit C: Editorial Structures of WNYW(TV), WWOR-TV and the *New York Post*

In the matter of )  
)  
FOX TELEVISION STATIONS, INC. )  
)  
Licensee of Television Stations )  
WNYW(TV), New York, New York, and )  
WWOR-TV, Secaucus, New Jersey )  
)  
NEWS CORPORATION )  
)  
Request for Waiver of the Newspaper/  
Broadcast Cross-Ownership Rule )  
Relating to WNYW(TV), WWOR-TV )  
and the New York Post )

Fox Television Stations, Inc. (“FTS”) and News Corporation (“News Corp”) hereby supplement their request for modification of their existing permanent waiver of the newspaper/broadcast cross-ownership rule (“NBCO rule”)<sup>1</sup> to encompass operation of a second television station in New York, New York, the nation’s largest media market, as requested by the Commission’s Report and Order in MB Docket No. 06-121.<sup>2</sup>

<sup>2</sup> See *In re 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report & Order, MB Docket No. 06-121, FCC 07-216 (released Feb. 4, 2008), ¶ 78 (the “2008 Report & Order”).

Pursuant to a permanent waiver of the NBCO rule granted by the Commission in 1993, and reaffirmed in 2006, FTS has operated WNYW(TV), New York, New York, while News Corp, through a subsidiary, operates the *New York Post*, a daily newspaper. The Commission also has granted FTS temporary waivers of the NBCO rule, in both 2001 and 2006, to permit common ownership of the *Post* and a second television station, WWOR-TV, Secaucus, New Jersey.

In 2003, the Commission repealed the NBCO rule, replacing it with cross media limits, which would have permitted common ownership of the *Post* and two television stations in the New York market. However, the U.S. Court of Appeals for the Third Circuit, while affirming the FCC's repeal of the rule, nonetheless stayed the Commission's decision pending the completion of remand proceedings. In light of the Commission's decision to eliminate the cross-ownership ban, FTS filed the Modification Petition in September 2004, asking that its existing permanent waiver be expanded to cover the cross-ownership of WWOR-TV. In the *2008 Report & Order*, the Commission once again concluded that the NBCO rule is not necessary to promote competition, diversity or localism. Yet rather than repeal the ban altogether, the Commission merely provided for an extremely modest and limited relaxation of the NBCO rule.

As part of this relaxation, and notwithstanding its own 2003 decision to repeal the NBCO rule entirely in light of the mountain of evidence confirming that the rule has long since outlived any vitality it may once have had, the Commission established a presumption that any combination of more than one newspaper and/or broadcast station in a single market would disserve the public interest. The FCC instructed entities with newspaper/broadcast combinations that do not comply with the

new NBCO rule to supplement their pending waiver requests or otherwise file for new permanent waivers.<sup>3</sup>

FTS and News Corp submit this supplement to update the record since the filing of the Modification Petition, and to confirm that common ownership of WNYW(TV), WWOR-TV and the *New York Post* in the incredibly diverse and competitive New York market cannot possibly cause any public interest harms. If anything, the public interest is harmed by the continuing cloud over News Corp's ownership of the *Post*, which discourages investment by News Corp in the further development of the newspaper. News Corp, which already has spent hundreds of millions of dollars in reliance on the permanent waiver to improve the facilities and operations of the *Post* (creating more than 500 new jobs), cannot rationally continue to invest in further improvements without the regulatory certainty that would be provided by

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<sup>3</sup> FTS and News Corp demonstrated in 2001 and reiterated in 2004 that the NBCO rule does not apply with respect to ownership of a second television station and a daily newspaper, so long as the combination complies with the local television ownership rule. *See infra* Section I.B. FTS and News Corp in 2004 nonetheless asked the FCC to modify the permanent waiver to eliminate any doubt that ownership of a second television station in New York is permissible. In directing parties with existing combinations of more than one station and/or more than one newspaper to supplement their requests for waiver as part of the *2008 Report & Order*, the Commission observed that four waiver/renewal applicants "fall into this category . . ." *2008 Report & Order*, ¶ 78 & n.257. The FCC did *not*, however, list FTS or News Corp as one of these parties. FTS and News Corp assume that the Commission excluded them from the list because the FCC intends to act on the pending Modification Petition under the standards that governed waiver requests at the time the request was filed (rather than the new standards announced in the *2008 Report & Order*). Indeed, the Commission should have considered the Modification Petition long ago, and had it done so, it would have been compelled by the overwhelming evidence of diversity and competition in New York to grant FTS' and News Corp's request. FTS and News Corp are supplementing the Modification Petition here out of an abundance of caution, and because it is clear that even under the FCC's new four factor analysis, there can be no doubt that common ownership of WNYW(TV), WWOR-TV and the *Post* should be permissible.

a permanent waiver permitting common ownership of WNYW(TV), WWOR-TV and the newspaper. Without its stewardship, News Corp believes that the *Post* would not survive.

**I. NEWS CORP HAS RELIED ON WAIVERS OF THE FCC'S CROSS-OWNERSHIP RULE TO SAVE THE NATION'S OLDEST DAILY NEWSPAPER FROM EXTINCTION**

**A. Grant of the Permanent Waiver in 1993 Enabled News Corp to Rescue the *New York Post* from the Throes of Bankruptcy**

As set forth in the Modification Petition, News Corp's efforts to promote newspaper competition and diversity in New York date back more than 30 years.<sup>4</sup> News Corp first acquired the *New York Post* – the nation's oldest continuously published daily newspaper – in 1976. FTS entered television broadcasting a decade later with its acquisition of six television stations from Metromedia, Inc., forming the foundation of a fourth major national television network, FOX. The Commission's cross-ownership prohibition, however, required News Corp to choose television over its daily newspaper holdings in the New York and Chicago markets.<sup>5</sup> News Corp was forced to divest the *Post* in March 1988, but a subsequent owner ultimately proved unsuccessful in running

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<sup>4</sup> See Modification Petition, at 3.

<sup>5</sup> See *In re Applications of Metromedia Radio & Television Inc. (Assignor) to News America Television Incorporated (Assignee)*, 102 F.C.C. 2d 1334, ¶ 28 (1985) (granting News Corp a 24-month waiver to comply with the cross-ownership rule in New York and Chicago and concluding that the "existence of the numerous media outlets serving New York, Chicago and surrounding areas supports [the Commission's] conclusion that no undue concentration of the media would result from a limited waiver"). News Corp divested the *Chicago Sun Times* in 1986 soon after grant of the temporary waiver.

News Corp was similarly required to choose television over newspaper ownership in Boston, where it sold the *Boston Herald* in 1994 in order to repurchase WFXT(TV). See John R. Wilke, *News Corp. Plans to Sell Boston Herald to Purcell, Paper's Longtime Publisher*, Wall St. J., Feb. 7, 1994, at B3B.

the newspaper, and its corporate parent was forced to seek bankruptcy protection in 1993.<sup>6</sup>

Due to the lack of qualified purchasers or other viable alternatives that would ensure the survival of the *Post*, News Corp agreed to reassume management of the paper conditioned upon obtaining a permanent waiver of the cross-ownership rule.<sup>7</sup> The Commission granted News Corp's request for the permanent waiver in the summer of 1993.<sup>8</sup> In doing so, the FCC found that News Corp had "amply justified" its request for the permanent waiver and expressly concluded that the permanent waiver would not endanger competition or diversity.<sup>9</sup> Only through a permanent waiver of the cross-ownership rule – one which guaranteed that it would not again be forced to divest the *Post* – could News Corp have justified in 1993 and subsequent years the large investment needed to stabilize the newspaper and implement a long-term plan to negotiate with labor unions, suppliers, and distributors and to win back advertisers and readers.<sup>10</sup>

News Corp's stewardship of the *Post* over the past 15 years has only served to validate the FCC's decision to grant the permanent waiver. Since it reacquired

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<sup>6</sup> See *In re Fox Television Stations Inc., Licensee of Television Station WNYW, New York, New York, Request for Waiver of the Broadcast-Newspaper Cross-Ownership Rule Relating to WNYW and the New York Post*, Declaratory Ruling, 8 FCC Rcd 5341, ¶¶ 3-12 (1993) ("1993 Permanent Waiver"), *aff'd sub nom. Metropolitan Council of NAACP Branch v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995).

<sup>7</sup> See *1993 Permanent Waiver*, 8 FCC Rcd ¶ 12. News Corp acquired the *Post* through an indirect wholly owned subsidiary.

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* ¶¶ 44, 52. As the Commission noted, then Governor Cuomo, one of New York's United States Senators and various community leaders strongly supported News Corp's acquisition of the *Post*. See *id.* ¶ 12.

<sup>10</sup> See *id.* ¶ 45.

the newspaper in reliance on the waiver, News Corp has launched a Sunday edition and has built a \$300 million, state-of-the-art printing and distribution plant in the economically depressed South Bronx. The printing facility, which was built on a site that had not been utilized since the 1970s, has brought numerous employment opportunities to an otherwise economically disadvantaged area of New York City. Despite the fact that it would have been much less costly to locate the paper's printing facility outside of the city and state of New York, News Corp kept the newspaper's operations in New York City. Absent the grant of the permanent waiver in 1993, enforcement of the cross-ownership prohibition would have resulted in the demise of the *Post* as an alternative voice in the market and the loss of hundreds of jobs for current and future workers.<sup>11</sup>

In granting the permanent waiver, the Commission specifically found that the proposed combination would not result in undue market power in the uniquely competitive New York market.<sup>12</sup> Moreover, the Commission concluded that preserving the *Post* would benefit diversity, and granted the waiver with the intention of providing the certainty of ownership continuity necessary to assure the paper's viability.<sup>13</sup> The Commission noted that "there is evidence that [News Corp's] ownership may be pivotal to the newspaper's survival."<sup>14</sup> In short, the *1993 Permanent Waiver* ensured the

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<sup>11</sup> See *id.* ¶ 44 (Commission noting that "absent a waiver, its [the *Post*'s] future is in doubt").

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> *Id.* ¶¶ 42, 44; see also *In re The Applications of UTV of San Francisco, Inc., et al. (Assignors) and Fox Television Stations, Inc. (Assignee)*, Memorandum Opinion & Order, 16 FCC Rcd 14975, ¶¶ 35-38 (2001) ("*Fox/Chris-Craft Order*") (summarizing history of grant of permanent waiver in 1993).



preservation of the *Post* and enabled News Corp to contribute to increasing the diversity of viewpoints and competition in the New York media market.

**B. In Granting a Series of Temporary Waivers to Permit Combined Ownership of the *Post* with WNYW(TV) and WWOR-TV, and Refusing to Grant a Permanent Waiver Notwithstanding the Judicially Affirmed Repeal of the NBCO Rule, the Commission has Cast a Pall over the Future of the Newspaper, Threatening Diversity in the New York Market**

*2001 Acquisition of WWOR-TV.* FTS acquired WWOR-TV, Secaucus, New Jersey, in connection with its 2001 acquisition of the 10 television stations previously controlled by Chris-Craft Industries, Inc.<sup>15</sup> FTS' purchase of WWOR-TV fully complied with the Commission's local television ownership rule, which the Commission had revised in 1999.<sup>16</sup> FTS argued in the application for assignment of license that the *1993 Permanent Waiver* also permitted it to acquire WWOR-TV.<sup>17</sup> It pointed out that in relaxing the local television rule, the Commission analyzed the television market only and found that the number of newspapers in the market was not

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<sup>15</sup> See *Fox/Chris-Craft Order*, 16 FCC Rcd ¶¶ 40-45.

<sup>16</sup> The modified rule permitted common ownership of two television stations in the same Nielsen Designated Market Area ("DMA") if, at the time the assignment application was filed: (1) at least one of the stations was not ranked among the top four stations in the DMA based on the most recent all-day (9:00 a.m. – midnight) audience share as measured by Nielsen Media Research; and (2) more than eight independently owned, full-power and operational stations (commercial and noncommercial) were licensed in the DMA. At the time of FTS' acquisition, neither WNYW(TV) nor WWOR-TV were ranked in the top-four in terms of audience ratings and there were 20 independently owned and operating full-power stations in the DMA. See Applications for Assignment of License, File Nos. BALCT-20000918ABB *et al.*, Exhibit 4, at 2-3 ("*Chris-Craft Assignment Application*").

<sup>17</sup> See *id.* at 19-22.